NO. 87-1656

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

CONSOLIDATED ALUMINUM CORPORATION,
Petitioner

v

C. F. BEAN CORPORATION, BEAN DREDGING CORPORATION, AMERICAN EMPLOYERS INSURANCE COMPANY, OCEAN MARINE INDEMNITY COMPANY, LTD., ST. PAUL FIRE AND MARINE INSURANCE COMPANY, HIGHLAND INSURANCE COMPANY and ARKWRIGHT-BOSTON MANUFACTURERS MUTUAL INSURANCE COMPANY,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION OF ST. PAUL FIRE AND MARINE INSURANCE COMPANY

Mat M. Gray, III
(Counsel of Record)
FARIS, ELLIS, CUTRONE & GILMORE
1207 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: (504) 581-6373

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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ST. PAUL FIRE AND MARINE INSURANCE COMPANY'S[1] RESTATEMENT OF THE MATERIAL FACTS

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[1] In accord with Rule 28.1, St. Paul Fire and Marine Insurance Company is a member of the St. Paul Group managed by the St. Paul Companies, Inc., a holding company. Members and affiliate companies are St. Paul Mercury Insurance Company, St. Paul Guardian Insurance Company, The St. Paul Insurance Company, St. Paul Fire and Marine Insurance Company (UK) Limited, The St. Paul Insurance Company of Illinois, Seaboard Surety Company, Seabord Surety Company of Canada, St. Paul Property and Casualty Insurance Company, St. Paul Insurance

Bean was performing dredging work under contract to the United States Corps of Engineers in the Calcasieu River near Lake Charles, Louisiana. There were approximately twenty (20) separate pipelines crossing under the river within the project area. The nature of the product or natural resource, if any, being carried in a pipeline, the destination of the pipeline, whether it served residential or industrial customers, or whether it was connected to a pipeline system was unknown.

During its dredging activity, through inadvertence of the crewmembers, the cutter head contacted and ruptured a pipeline owned by Texaco as it crossed under the river.

Unknown to Bean, Consolidated Aluminum and Texaco had contracted for delivery of gas. The Consolidated Aluminum plant was located approximately six (6) miles distant from the rupture site. It was not directly connected to the ruptured pipeline but was on an independent line connected to a vast Texaco pipeline system. Closer to the site of the rupture but still over five (5) miles distant was the PPG plant. The Consolidated Aluminum plant was on a feeder line from the gas pipeline originally built for PPG. Both plants were "upstream" in the gas distribution system.

Notwithstanding the fragile aluminum plant's dependence of constant power, the plant owner had elected to rely solely on Texaco's ability to deliver gas with no provision for alternative fuel sources, contrary to industry standards. Also, as there were no block valves on either

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(Footnote 1 continued)
Company of North Dakota, St. Paul Fire and Casualty Insurance Company, St. Paul Indemnity Insurance Company, Atwater McMillan Incorporated, St. Paul Surplus Lines Insurance Company, Ramsey Insurance Company, Athena Assurance Company, and St. Paul Lloyds.

side of the river channel, Texaco had to shut-in a major line about twenty (20) miles away from the rupture site for repairs to be done, and this caused the interruption of gas deliveries under the contract. No one could know that the rupture of the pipeline, requiring its temporary closure for repairs, could cause indirect, remote physicial damage to any industrial plant, residential customer, or anyone else distant from the site of the rupture. For example, PPG sustained no indirect physical damage.

Initially, the suit by Consolidated was dismissed on motion for summary judgment on the basis that Consolidated's indirect, remote "physical" damage arose only from the inability of Texaco to perform its duties under its contract with Consolidated Aluminum. This contract was unknown to Bean and there was no intentional interference with the contract relationship. The District Court concluded that the tort to Texaco did not give rise to a cause of action by a third-party in contract with Texaco, who was damaged through a loss of contract benefits. On appeal, the Fifth Circuit Court of Appeals reversed, stating that since Consolidated Aluminum had sustained "physical" damages, albeit remote, the "bright line" rule established in maritime cases[2] should not be applied to eliminate a cause of action. It remanded the proceedings to the District Court to determine whether Consolidated was entitled to recover under traditional principles of foreseeability and of legal duty.

On remand, Bean Dredging Corporation moved for a summary judgment, which was denied. The District Court decided to conduct a full trial on the merits to determine if, as a matter of fact, Consolidated Aluminum could establish a right to recover under the principles of foreseeability and of legal duty.

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[2] *State of Louisiana ex rel Guste v. Testbank*, 752 F.2d 1019 (5th Cir. 1985).

At the trial, Consolidated produced but one expert/fact witness on the issue of legal duty and foreseeability. This expert witness, a realtor, had worked on land acquisitions of the Louisiana salt domes in connection with long-term storage of oil reserves. He had personal, confidential information obtained from oil companies about their pipeline systems. Based on that experience, he testified that it was generally known in the Lake Charles area that pipelines served industry, among other customers. Nonetheless, he admitted that, to the best of his knowledge, no plant and no other customer of a gas line would sustain physical damages as a result of an interruption of service. Plants have back-up, or alternate, sources of power. *Tr.* v. 12 at 628-631, 634.

The District Court in its opinion made many findings of facts. 639 F. Supp. at 1175-81; Petition for Writ, App. B, 1-28. These included that the Consolidated plant was unique among aluminum plants in not having an alternative energy source. The sequence of events requiring Texaco to shut off a valve upstream from the Consolidated plant over twenty (20) miles away from the point of rupture, coupled with the remoteness of the plant from the work site, and the choice of the plant to have no alternative or back-up energy source, led to the conclusion that the damage was not foreseeable and that no duty was owed to this aluminum plant.

In their opinions, the District Court and the Fifth Circuit considered maritime and non-maritime cases, and treatises, to illuminate the traditional tort principles of foreseeability and duty. Based on the factual evidence, the district judge denied a recovery. The Appellate Court affirmed the trial court's factual findings. Both courts held that the Consolidated plant was not part of a class of persons who foreseeably might be injured through the negligence of a vessel in rupturing a distant pipeline. Its

highly extraordinary damages were beyond the pale of general harm which reasonably might have been anticipated by negligent dredgers. 833 F.2d at 68; Petition for Writ, App. A-7.

ARGUMENT

THE QUESTION PRESENTED AS ARTICULATED BY PETITIONER IS WITHOUT FOUNDATION IN THE LOWER COURT OPINIONS.

Consolidated represents to this Court in its "question presented" that the District Court and the Fifth Circuit Court of Appeals held that the plaintiff was a member of a class to which the risk of general harm was foreseeable but that it was denied a recovery because the extent of the harm or the manner of its occurrence was not foreseeable. This is not correct.

After a survey of maritime, common law, and treatises, the Fifth Circuit Court of Appeals referenced the following as a general definition of foreseeability:

> We perceive a harm to be the foreseeable consequence of an act of omission if harm of a general sort to persons of a general class might have been anticipated by a reasonably thoughtful person, as a probable result of the act or omission, considering the interplay of human forces and likely human intervention.

833 F.2d at 68; Petition for Writ, App. A-7.

The Fifth Circuit Court of Appeals, *inter alia*, held:

> Applying this definition, we are not persuaded that Bean could have anticipated that its failure to follow safe dredging practices would likely result in physical damage to the equipment and work-in-progress at Consolidated

> Aluminum's reduction plant several miles away. The harm was not of a general sort expected to follow from the failure to dredge carefully in proximity to a gas pipeline.

833 F.2d at 68; Petition for Writ, App. A-7

The Fifth Circuit in its conclusion observed that it found "no error in any factual finding or legal conclusion in the trial court's opinion that the damages suffered by Consolidated were not foreseeable and, as such, not within the reach of the duty imposed on Bean to perform its dredging operations in a non-negligent manner." 833 F.2d at 68; Petition for Writ, App. A-8.

In his opinion, District Court Judge Vernon made forty-two (42) findings of fact after a trial on the merits. These included:

> The testimony of Mr. John Fitzgerald, formerly of Kaiser Aluminum, and Mr. Dwight Keller, formerly with Reynolds Aluminum, made it clear that the Consolidated Lake Charles plant, with no secondary source of back-up, was unique in the aluminum industry. No other aluminum reduction plant is fed with power from only one source. Consolidated's situation was unheard of in the aluminum industry.

639 F. Supp. at 1179; Finding of Fact No. 30, Petition for Writ, App. B-12.

> Considering the actual delivery of Texaco's gas, even Mr. Boyer (Consolidated's Chief Executive in charge of the original planning and construction of the plant) did not expect a "fail safe" system. Although he believed that Texaco's "vast distribution system" was a reliable one, Boyer did not evaluate any of the risks to his plant in the event of an interruption in Texaco's "vast" pipeline system.

639 F. Supp. at 1179-80; Finding of Fact No. 32, Petition for Writ, App. B-13.

The District Court considered "the legal duty owed by Bean, the scope of that duty, to whom it was owed, and the foreseeability of Consolidated's harm."639 F. Supp. at 1181; Petition for Writ, App. B-17-18. It reviewed maritime and non-maritime standards for foreseeability in considering whether Bean could have reasonably anticipated a risk of physical harm to Consolidated.

The District Court found, as a matter of fact, that Bean could not possibly have foreseen that its improper dredging practices would have subjected a plant so remotely located to an unreasonable risk of harm. The Consolidated plant was not near the site of the rupture of Texaco's pipeline and its damage only occurred because Texaco was unable to deliver natural gas through its pipeline system pursuant to its contract with Consolidated. The District Court concluded its factual analysis, as follows:

> Consolidated, however, is not a pipeline owner. Neither is Consolidated an owner of any property near the site of the rupture of Texaco's pipeline, unlike PPG whose plant was located proximate to the pipeline. Consolidated's damage occurred only because Texaco was unable to deliver the natural gas as was contracted for by Consolidated and Texaco. Only after that natural gas supply was interrupted did the physical damage to Consolidated's facilities occur. Consolidated's plant was located more than six miles away from the point of rupture, on a different body of water, and "upstream" in Texaco's gas distribution system. It is clear that Bean had no knowledge of Consolidated's connexity to the Texaco pipeline. There was nothing to even suggest that Bean reasonably anticipated or should have reasonably anticipated that a rupture of the Texaco pipeline

> would cause such physical damage to such a remotely located plant. Consolidated was so far outside the zone of any obvious danger from Bean's dredging that no reasonable person would have anticipated that Consolidated would suffer physical harm as a result of Bean's dredging. In comparison to the PPG case, the possibility of physical harm involved here was much more remote and attenuated than the mere possibility of economic loss.
>
> For the foregoing reason, this Court finds that the physical damage sustained by Consolidated was an unforeseeable consequence of the rupture of Texaco's pipeline by Bean and therefore, Bean is not liable.

639 F. Supp. at 1182-83; Petition for Writ, App. B-21-22.

It is misleading and inaccurate for Consolidated to imply that the lower court found that plaintiff was a member of a class to which the risk of general harm was foreseeable. The fact findings by the District Court, expressly affirmed by the Fifth Circuit Court of Appeals, are exactly to the contrary. The lower courts in no way held that a recovery was denied because a tortfeasor could not predict the extent of the damages sustained or the precise manner of their occurrence.

THE FIFTH CIRCUIT OPINION DOES NOT CONFLICT WITH DECISIONS OF ANY OTHER CIRCUIT. IT IS CONSISTENT WITH RECOGNIZED PRINCIPLES IN COMMON LAW AND IN ADMIRALTY.

Petitioner's argument rests on its statements that the Fifth Circuit opinion conflicts with such decisions as petition of *Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964), *cert. denied* 380 U.S. 944 (1965) and *Pastore v. Taiyo*

Gyogyo, 571 F.2d 777 (3rd Cir. 1978). This is incorrect.

Kinsman did not involve the issues at bar. A negligently moored vessel had drifted downriver and caused injury to riparian property owners and vessels. These damages were not disputed as unforeseeable. Damage to a vessel mored downriver was the general sort of harm to be expected.[3]

Consistent with these principles, in the case at bar, the District Court and Appellate Court queried: Was the plant a member of a class of persons to which a general harm might be anticipated by the rupture of a pipeline forming part of a vast distribution system extremely remote from the plant, which pipeline its downstream from the plant, and on a different body of water? The lower courts found that the Consolidated plant was not a member of any general class to which harm might be anticipated. The evidence did not establish that any plant or industry would likely sustain physical damage as a consequence of a dredge striking a pipeline crossing under a remote ship channel. Consolidated's damages were merely theoretically possible consequences which may happen so uniquely and infrequently that no one could reasonably anticipate them or expect them to occur.

Consolidated's argument that the decision below conflicts with the Third Circuit decision in *Pastore v. Taiyo Gyogyo, supra* p. 10, is not valid. The relationship of legal theories between *Pastore* and *Bean* is non-existent. The principles are not analogous. In *Pastore,* a fire on a ship caused by a stevedore's breach of the warranty of

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[3] "No one would dream of saying that a ship owner who knowingly and willfully failed to secure his ship at a pier on a river 'would not have threatened' persons and owners of property downstream in some manner." *Kinsman,* 338 F.2d at 722.

workmanlike service compelled shoreside foremen to respond to the emergency. The evidence presented a jury issue on whether the ship was negligent. The ship was held liable for failing to warn the firemen that their ladder was resting on a tarpaulin covering unstable cargo and not on the deck, and it was unsafe. Notwithstanding its negligence, the ship was allowed indemnity from the stevedore based on the breach of a warranty of workmanlike performance which caused an unseaworthy condition to be brought into play. This case is inapposite and in part peculiar to cases arising under the *Ryan* doctrine[4] preceding the 1972 amendments to the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Section 905.

With respect to the Third Circuit, in its opinion the District Court in the case sub judice cited Third Circuit prededent in *Diamond State Tel. Co. v. Atlantic Refinery Co.*, 205 F.2d 402 (3rd Cir. 1953). There is consonance between the circuits, not dissonance. 639 F. Supp. at 1182; Petition for Writ, App. B-19.

This Court will also note the inapplicability of *Spinks v. Chevron Oil Co.*, 507 F.2d 216 (5th Cir. 1975), to the maritime tort in this proceeding. *Spinks* did not even consider whether a legal duty was owed. *Spinks* was a Jones Act personal injury case. By statute, an employer owes a duty to its employee/seaman, a ward of the admiralty. 46 U.S.C. Section 688. The Jones Act does not require proximate cause for a recovery, and there is a "featherweight" burden of causation where the slightest neglect of an employer playing any part in an injury, no matter how remote, allows a recovery. Such principles have never been applied to maritime torts involving commercial property damages.

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[4] *Ryan v. Pan Atlantic SS Corp.*, 350 U.S. 124, 76 S. Ct. 232 (1956).

With respect to the Restatement (Second) of Torts, we submit that petitioner's citation is self-defeating. Under Section 435 of the Restatement, the actor's conduct may not be a legal cause of harm to another where the event, looking back, appears to the Court "highly extraordinary" that it should have brought about the harm. The lower court's opinions and fact findings are entirely consistent with ths standard. The harm to the Consolidated plant was highly extraordinary, remote, tenuous, and therefore, unforeseeable.

CONCLUSION

Acts of negligence are viewed in the context of each controversy on their own facts consistent within the basic principles and social policies of foreseeability. The lower courts made their fact findings under well established tenets of foreseeability and legal duty. The case involves unusual, extraordinary facts. It sets no precedents.

The Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

MAT M. GRAY, III
FARIS, ELLIS, CUTRONE & GILMORE
1207 Whitney Bank Building
New Orleans, Louisiana 70130
Telephone: 504-581-6373

By: _____
MAT M. GRAY, III
Counsel for Respondent
St. Paul Fire and Marine Insurance Company

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing have been sent to each opposing counsel of record, by depositing same in the U.S. Mail, postage prepaid, this _____ day of May, 1988.

I further certify that all parties required to be served have been served.

_____

MAT M. GRAY, III